Chin Soo Ling & Ors v Teh Lay Gaik

HIGH COURT (PENANG) — CIVIL SUIT NO 22–296 OF 2003
CHEW SOO HOO JC
11 MARCH 2010

Civil Procedure — Counterclaim — Defence to counterclaim — Whether there was merit in defence — Whether action desperate attempt to resurrect plaintiffs' defence in counterclaim

Succession — Probate — Grant of probate — Capacity to sue for and on behalf of estate in absence of grant of probate — Whether executor derived title and authority from will — Whether defendant could institute action in capacity as executrix before grant of probate

The plaintiffs were the children of the deceased while the defendant was their stepmother. The plaintiffs commenced the writ action against the defendant since 28 March 2003. The defendant defended the action and filed a counterclaim dated 28 July 2003. In her counterclaim the defendant pleaded that the grant of probate in respect of the estate of the deceased could not be extracted as a result of the plaintiffs having entered their caveat in the Registration of Probate Office. This resulted in losses to the estate of the deceased arising from the liabilities that the estate and the defendant had to bear. However, on 16 June 2005, the plaintiffs discontinued the writ action on their own accord thereby abandoning their claims against the defendant. As a consequence, the court found that the liability was clear and the only issue left was the quantum of damages suffered, if any. The court therefore ordered that the parties to refer the counterclaim to mediation for a settlement. The mediation, however, failed and hence the matter was before the court again.

Held, allowing the defendant's counterclaim with costs:

(1) When the plaintiffs have withdrawn or discontinued with their claims, what was left in the suit was the counterclaim. The plaintiffs had never objected nor requested that the counterclaim be tried when liability was so determined. The court also ordered that the only issue left was the quantum of damages suffered. In the presence of such a clear order for which both parties had accepted at that time, it was against the integrity of the parties or the plaintiffs now to contend that the defendant had to prove otherwise. The court found such argument to be contemptuous to the order made by the learned judge where both parties have so accepted without any objection (see para 6).

(2) The whole defence to counterclaim failed because the substratum of a caveat to prevent the grant of probate to pursue their legitimate claims in the estate of the deceased against the defendant had collapsed. It was only a desperate attempt to resurrect the plaintiffs' defence in the counterclaim. There was no longer any merit in the pleaded defence to enable the plaintiffs to raise all the issues that they attempted to contend (see para 7).

(3) The court found it most unjust for the plaintiffs to contend that the defendant had no capacity to sue for and on behalf of the estate when the grant of probate was not extracted as in the first place, it was plaintiffs' caveat which prevented the defendant, being the sole executrix from extracting the grant of probate. Based on *SMKR Meyappa Chetty v SN Supramanian Chetty* [1916] 1 AC 603 it was clear that an executor derives his title and authority from the will of his testator and not from any grant of probate. Thus, the defendant could institute an action in her capacity as executrix before the grant of probate (see paras 7–8).

(4) Taking into consideration the circumstances in the case, the court allowed the defendant's claim for damages on interest accrued, in the sum of RM228,850.19. Further, the court, having considered the bank statements produced in support of the claim of OD interest allowed the interest of RM11,997.66 as at 31 January 2006 as it was the latest figure. However, the court found insufficient proof of the damages in respect of property Nos 6 and 7 and thus the claim pertaining to the same were not allowed (see paras 18–19).

(5) The estate was entitled to sell whatever properties for a profit and all the most for substantial profit. The plaintiffs must prove their assertion that the defendant had made a substantial profit and should claim no more. However, there was nothing before the court that the caveat was the cause of the substantial profit and in the circumstances the plaintiff's contention was without merit (see para 23).

(6) In the circumstances the court ordered that the plaintiffs should pay the defendant damages in the total sum of RM252,110.92 (see para 25).

[Bahasa Malaysia summary

Plaintif-plaintif merupakan anak si mati manakala defendan adalah ibu tiri mereka. Plaintif-plaintif memulakan tindakan writ terhadap defendan semenjak 28 Mac 2003. Defendan membela tindakan tersebut dan memfailkan tuntutan balas bertarikh 28 Julai 2003. Dalam tuntutan balasnya defendan memplid bahawa pemberian probet berikutan harta pusaka si mati tidak boleh diekstrak kerana plaintif-plaintif memasukkan kaveat mereka di Pejabat Pendaftaran Probet. Ini mengakibatkan kerugian kepada harta pusaka si mati berikutan liabiliti-liabiliti yang mana harta pusaka dan defendan harus menanggungnya. Walau bagaimanapun, pada 16 Jun 2005, plaintif-plaintif

menghentikan tindakan writ mereka secara sukarela dan melepaskan tuntutan mereka terhadap defendan. Akibatnya, mahkamah mendapati bahawa liabiliti tersebut telah dijelaskan dan satu-satunya isu yang tinggal ialah kuantum kerugian yang dialami, jika ada. Oleh itu mahkamah memerintahkan bahawa pihak-pihak merujuk tuntutan balas tersebut kepada pengantaraan untuk satu penyelesaian. Tetapi pengantaraan tersebut gagal dan justeru itu, perkara ini dihadapkan ke mahkamah sekali lagi.

Diputuskan, membenarkan tuntutan balas defendan dengan kos:

(1) Apabila plaintif-plaintif menarik balik atau tidak meneruskan tuntutannya, apa yang tinggal dalam guaman tersebut ialah tuntutan balas. Plaintif-plaintif tidak pernah membantah atau meminta tuntutan balas tersebut dibicarakan apabila liabiliti telah pun ditetapkan. Mahkamah juga memerintahkan bahawa satu-satunya isu yang tinggal ialah kuantum kerugian yang dialami. Dengan adanya perintah yang sangat jelas itu yang mana telah diterima oleh pihak-pihak pada masa itu, adalah bertentangan dengan integriti pihak-pihak atau plaintif-plaintif untuk menyatakan bahawa defendan mesti membuktikan sebaliknya. Mahkamah mendapati bahawa hujahan tersebut adalah menghina perintah yang telah dibuat oleh hakim yang bijaksana apabila kedua-dua pihak telah menerimanya tanpa apa-apa bantahan (lihat perenggan 6).

(2) Keseluruhan pembelaan kepada tuntutan balas tersebut gagal kerana asas suatu kaveat untuk menghalang pemberian probet bagi meneruskan tuntutan sah mereka terhadap harta pusaka si mati terhadap defendan tidak kukuh. Pembelaan tersebut hanyalah percubaan terakhir untuk membangkitkan semula pembelaan plaintif-plaintif dalam tuntutan balas. Tiada lagi merit dalam pembelaan yang diplidkan bagi membolehkan plaintif-plaintif membangkitkan kesemua isu yang cuba diketengahkan (lihat perenggan 7).

(3) Mahkamah mendapati bahawa amatlah tidak adil bagi plaintif-plaintif mempertikaikan bahawa defendan tiada kapasiti untuk menyaman bagi dan bagi pihak harta pusaka tersebut apabila pemberian probet tidak diekstrak kerana, kaveat plaintif-plaintif yang menghalang defendan, yang merupakan satu-satunya pentadbir daripada mengekstrak pemberian probet itu. Berdasarkan kes *SMKR Meyappa Chetty v SN Subramanian Chetty* [1916] 1 AC 603 adalah jelas bahawa seorang pentadbir mendapat milikan dan kuasa daripada wasiat pewasiat dan bukannya daripada pemberian probet. Oleh itu, defendan boleh memulakan tindakan dalam kapasitinya sebagai pentadbir sebelum pemberian probet (lihat perenggan 7–8).

(4) Mengambilkira keadaan kes ini, mahkamah membenarkan tuntutan defendan atas kerugian faedah yang terakru sejumlah RM228,850.19. Selanjutnya, mahkamah, setelah mempertimbangkan penyata-penyata

bank yang dikemukakan bagi menyokong tuntutan faedah OD membenarkan faedah sebanyak RM11,997.66 setakat 31 Januari 2006 kerana itu merupakan jumlah terkini. Tetapi, mahkamah mendapati keterangan yang tidak mencukupi bagi kerugian berkaitan harta No 6 dan 7 dan oleh itu tuntutan ke atasnya tidak dibenarkan (lihat perenggan 18–19).

(5) Harta pusaka berhak menjual apa-apa harta untuk keuntungan dan lebih-labih lagi untuk keuntungan substansial. Plaintif-plaintif mestilah membuktikan penegasan mereka bahawa defendan telah mendapat keuntungan substansial dan tidak harus membuat tuntutan lagi. Tetapi, mahkamah mendapati tiada yang menunjukkan bahawa kaveat itu yang menyebabkan keuntungan substansial dan dalam keadaan ini, hujahan plaintif-plaintif tiada merit (lihat perenggan 23).

(6) Dalam keadaan ini, mahkamah memerintahkan bahawa plaintif-plaintif harus membayar defendan ganti rugi sejumlah RM252,110.92 (lihat perenggan 25).]

Notes

For cases on defence to counterclaim, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2246–2247.

For cases on probate in general, see 11 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 2387–2454.

Cases referred to

Elliot & Anor v Stamp & Anor [2006] 1 EHC 336, HC (distd)
SMKR Meyappa Chetty v SN Supramanian Chetty [1916] 1 AC 603, PC (refd)
Vella v Morelli [1968] IR 11, SC (distd)
Young v Cadell & Ors [2006] 1 EHC 49, HC (distd)

Legislation referred to

Rules of the High Court 1980 O 59 r 2(2)

PR Manecksha (Mohd Azhar bin Abdullah and Tunku Munawwir with him) (PR Manecksha & Associates) for the plaintiffs.
Mohd Amir Aizat bin Abd Rani (Karpal Singh & Co) for the defendant.

Chew Soo Hoo JC:

BACKGROUND FACTS

[1] The plaintiffs commenced this writ against the defendant since 28 March 2003, for which defendant had filed her statement of defence together with a counterclaim dated 28 July 2003. The defendant pleaded in her counterclaim that as a consequence of the plaintiffs having entered their caveat in the

registration of probate office, the grant of probate in respect of the estate of Ching Seh How, the deceased and the defendant's late husband, could not be issued resulting in losses to the estate of the deceased arising from the liabilities that the estate and the defendant had to bear.

[2] The plaintiffs are the children of the deceased while the defendant is their stepmother.

[3] On 13 June 2005, the plaintiffs had discontinued the writ against the defendant on their own accord thereby abandoning their claims against the defendant. As a consequence of the claim having been withdrawn on 26 July 2005, the court has found that liability is clear since the claim has been withdrawn and the only issue left is the quantum of damages suffered if any and the court ordered that the parties should refer the counterclaim of the defendant to mediation for a settlement with the costs to be borne by the three plaintiffs in equal shares of 1/3 each. The court also fixed 23 November 2005 for mention for the outcome. The mediation, however, failed and hence the matter is before this court again.

THE ISSUES

[4] Learned counsel for the plaintiffs who conducted this case, Encik Mohd Azfar bin Abdullah, argued that the hearing of this matter is in respect of the whole counterclaim in that the defendant has to prove the counterclaim. He raised issues whether the defendant is entitled to damages, on the relevancy of the questions and answers in the plaintiffs' witness statements in relation to the will and the death of the deceased that might probably be caused by the defendant, inter alia, the issue of whether the defendant had proved her counterclaim, the issue of whether the defendant had mitigated her losses and the question of costs.

[5] En Mohd Amir Aizat bin Abd Rani, learned counsel for the defendant contended that as per the order of the court made on 26 July 2005, the sole issue that is left is for the damages to be assessed or proved by the defendant and that is all for the current proceedings.

[6] Reading the court's record, the order made by YA Datuk Su Geek Yiam J, on 26 July 2005 is unequivocal and unambiguous that liability is clear since the claim against the defendant was withdrawn by the plaintiffs and 'the only issue left is the quantum of damages suffered, if any'. When the plaintiffs have withdrawn or discontinued with their claims, what is left in this suit is the counterclaim. Hence when the learned judge made the order that the liability is clear since the claim was withdrawn, it cannot be referring to any other matters except the liability of the plaintiffs in the counterclaim that is left.

Learned counsel for the plaintiffs at that material time had never objected nor requested that the counterclaim be tried when liability was so determined. The court then also ordered that the only issue left is the quantum of damages suffered if any which means that the defendant needs to prove the damages suffered. In the presence of such a clear order for which both parties have accepted at that time, it is against the integrity of the parties for learned counsel for the plaintiffs now to contend that the defendant had to prove otherwise. This court finds such argument to be contemptuous to the order that was made by the learned judge on 26 July 2005 where both parties have so accepted without any objection.

[7] On account of the above, the issue raised by the plaintiffs above are irrelevant except whether the defendant has proved the damages suffered. Be that as it may, looking at the plaintiffs' defence to the counterclaim which they stated that they were entitled in law to file a caveat to prevent the grant of probate in order to pursue their legitimate claims in the action herein and when they have withdrawn their claims, the whole defence to counterclaim fails because the substratum of a caveat to prevent the grant of probate to pursue their legitimate claims in the estate of the deceased against the defendant has collapsed. It is only a desperate attempt to resurrect the plaintiffs' defence in the counterclaim. By that, there is no longer any merit in the pleaded defence to enable the plaintiffs to raise all the issues that they now attempt to contend. The issues raised are therefore no longer relevant. Nevertheless, on the issue of law as to the capacity of the defendant to sue for and on behalf of the estate when the grant of probate was not extracted this court finds it most unjust for the plaintiffs to so contend as in the first place, it was the plaintiffs' caveat which prevented the defendant, being the sole executrix (see the will, P2) from extracting the grant of probate but upon the said caveat being withdrawn, the grant was issued on 1 October 2002 and duly extracted on 26 January 2006 for which the plaintiffs do not doubt and secondly, they did not plead that the defendant had no such capacity to sue which they now contend. On whether an executrix or executor can or cannot sue before the probate is extracted, Lord Parker in *SMKR Meyappa Chetty v SN Supramanian Chetty* [1916] 1 AC 603 at pp 608–609 had vividly set out the correct position of the law in the following words:

> It is quite clear that an executor derives his title and authority from the will of his testator and not from any grant of probate. The personal property of the testator, including all rights of action, vests in him upon the testator's death, and the consequence is that he can institute an action in the character of executor before he proves the will: He cannot, it is true, obtain a decree before probate, but this is not because his title depends on probate, but because the production of probate is the only way in which, by the rules of the court, he is allowed to prove his title.

[8] It is thus clear that the defendant can institute an action in her capacity as executrix before the grant of probate. It must be noted that it was the plaintiffs who initiated this action resulting in the defendant filling her defence and counterclaim. I have no compunction to reject this contention and the other issues which are irrelevant to this proceedings.

[9] Costs upon the withdrawal of the plaintiffs' claim, as agreed by both parties, had already been previously ordered by the court vide order dated 13 June 2005 to be assessed and taxed. This order is still effective and valid and shall therefore so remain to be taxed before the deputy registrar or the senior assistant registrar.

[10] This court will consequently determine the sole issue whether the defendant has proved the damages suffered as a consequence of the plaintiffs' act of lodging the said caveat which must certainly be construed as wrongful.

DAMAGES

[11] In the grant of probate dated 1 October 2002 as shown in bundle B pp 4–6 (exh P6) and the list of assets and liabilities in pp 7–8 (P7) annexed thereto, there were a total of eight properties involved in the estate namely:

Aset	Nilai
1. 1/2 bahagian dalam Lot 590 Sek. 3 Bandar Georgetown Daerah Timur Laut, Pulau Pinang yang terkandung dalan Geran No. 21016 serta sebuah premis No. 197 Jalan Macalister di atasnya.	RM600,000.00
2. 1/2 bahagian Lot 001215 Sek. 16, Bandar Georgetown, Daerah Timur Laut, Pulau Pinang yang terkandung dalam Geran (First Grade) No. 12311 serta premis No. 6 & No. 6A, Jalan Rangoon, 10400 Pulau Pinang, dibina di atasnya.	RM350,0000.00
3. 1/2 bahagian dalam seunit rumah kedai dikenali sebagai S2.26 (Luasnya: 358.1 kaki persegi) Plaza Bukit Mertajam, dibina di atas sebahagian tanah yang terkandung dalam H.S. (D) 182 P.T. 15, Seksyen 4, Bandar Bukit Mertajam, Daerah Seberang Perai Tengah, Pulau Pinang.	RM94,000.00
4. 1/2 bahagian dalam seunit rumah kedai dikenali sebagai S2.27 (Luasnya: 379.6 kaki persegi) Plaza Bukit Mertajam dibina di atas sebahagian tanah yang terkandung dalam H.S. (D) 182 P.T. 15, Seksyen 4, Bandar Bukit Mertajam, Daerah Seberang Perai Tengah, Pulau Pinang.	RM90,000.00
5. 1/2 bahagian parcel 3.55 (Luasnya: 499 kaki persegi) 3rd Floor, Prangin Mall, Komtar, Pulau Pinang (dibina di atas sebahagian tanah dikenali sebagai Komtar Phases (4A &4B))	RM199,000.00

6. 1/2 bahagian Parcel G-23, Ground Floor, Bandar Penas, dibina di atas sebahagian tanah-tanah dikenali sebagai lot-lot 109 & 110 yang terkandung dalam G.M. 111 & 112; Pegangan (Holdings) No. 419, 420 429 yang terkandung dalam Perakuan Pendahuluan Mengenai Hakmilik (Advance Certificate of Title) dan No. P.T. 3844 yang terkandung dalam H.S. (D) 5361 kesemuanya di Mukim 1, Seberang Perai Tengah, Pulau Pinang.	RM300,000.00
7. 1/2 bahagian rumah kedai bertingkat tiga (3 storey shop lot) dikenali sebagai Plot 59, (No. 81, Jalan Machang Bubok, Bandar Machang Bubok, SPT) dibina atas sebahagian tanah dikenali sebagai Lot 19, Mukim 16, Seberang Perai Tengah, Pulau Pinang, yang terkandung dalam Geran Mukim No. GM 337.	RM150,000.00
8. Suratan Hakmilik Sementara No. H.S. (D) 19166, P.T. 4315, Mukim Setapak, Daerah Gombak, Negeri Selangor.	RM180,000.00

Jumlah	RM1,963,000.00

[12] The claim for damages suffered by the defendant and/or the estate, according to the evidence of the defendant through her witness statement P1, in particular, is confined to the losses deriving from these eight properties aforesaid, inter alia, the interest on the loans or overdraft ('OD') imposed by the bank and bank charges during the relevant period when the caveat was lodged and remained effective confining to the period from the date of death of the deceased on 17 July 2002 till the grant of probate was extracted on 26 January 2006. These interest and fees imposed by the bank in respect of the aforesaid properties as submitted by the defendant are as follows:

No	Properties (as per P7)	Interest accrued and bank charges	Supporting Documents
1	1/2 share of land for property No 197 Jalan Macalister, 10450 Pulau Pinang.	RM70,741.20 (Outstanding loan = RM193,651.78)	P10
2	1/2 shares of land for Lot 001215 Sek 16, Bandar Georgetown, Daerah Timur Laut, Pulau Pinang and the premises erected thereon.	RM70,724.77 (Outstanding loan = RM189,028.02)	P11

3	1/2 shares of a shop unit known as S2.26, Plaza Bukit Mertajam.	RM8,878.81 (Outstanding loan =RM124,726.97)	P18
4	1/2 shares of a shop unit known as S2.27 Plaza Bukit Mertajam.	RM7,604.68 (Outstanding loan= RM124,841.72)	P19
5	1/2 shares of Parcel 3.5, 3rd Floor Prangin Mall, Komtar, Pulau Pinang.	RM88,788.76 (Outstanding loan =RM 112,178.94)	P16
6	1/2 shares of Parcel G-23, Ground Floor, Bandar Penas.	RM29,415.35 (Outstanding loan= RM 81,362.46)	P17
7	1/2 shares of a 3 storey shop lot known as Lot 59 (No 81 Jalan Machang Bubok, Bandar Machang Bubok, Seberang Perai Tengah).	RM29,129.89 (Outstanding loan= RM86,703.13 -30.1.2.2002)	P12–P15
8	Land held under title No HS(D) 19166, PT 4315, Mukim Setapak Daerah Gombak, Selangor.	Nil	
TOTAL	RM305,192.46		

[13] The interest accrued in respect of property No 1 includes an estimated interest at RM14,000 per year for the years 2003–2006 when the interest as shown in P10 in respect of the same property shows the interest for the year as at 31 December 2002 to be RM14,741.20.

[14] In respect of property No 2, the interest accrued as shown in P11 is RM14,724.77 and there is an estimated interest at RM14,000 per year for the years 2003–2006.

[15] As regards property No 5, the sum RM88,788.76 was made up of interest accrued for the period since the date of the lodgment of the caveat till 31 December 2006 amounting to RM49,475.50 and bank fees of RM39,313.26 as reflected in the bank statement P16.

[16] For property No 7, P12 shows the accrued interest for 2002 as at 31 December 2002 was RM7,041.13; P13 shows the accrued interest for 2005 was RM7,381.15 as at 31 December 2005; P14 shows the accrued interest for 2006 was RM8,772.46 as at 31 December 2006 while P15 shows the accrued interest for 2007 was RM1,959.19 as at 16 March 2007. For the year 2003 and 2004, the defendant estimates the interest to be RM7,000 for each of the two years.

[17] Although there is no challenge at all by the plaintiffs' solicitors as to all the above interest sums, this court nevertheless finds that the defendants is not entitled to claim the interest accrued for the whole year of 2006 upon the defendant restricting her claim to the specific period between 17 July 2002 and 26 January 2006 in submission since the grant of probate had been extracted by 26 January 2006. Any interest thereafter and for the year 2007 in respect of the aforesaid properties should, therefore, not be considered. Similarly, the interest accrued for the year 2002 is thus limited to only half a year at most from 17 July 2002. Consequently, taking all the aforesaid into consideration, this court will allow the defendant's claim for damages on interest accrued as follows:

Property No 1 — The sum of *RM49,370.60* (with the interest for the year 2002 calculated for 1/2 year and subtracting the estimated interest for 2006).

Property No 2 — The sum of *RM49,362.38* (similar deduction as in property 1 above).

Property No 3 — The sum as claimed — *RM8,787.81*.

Property No 4 — The sum as claimed — *RM7,604.68*.

Property No 5 — The sum as claimed of interest accrued of RM31,888.37 (having deducted the interest for year 2006 of RM11,724.75 as in P16 and 1/2 year of 2002 calculated on the same figure) and other fees of RM27,519.28 (being 3 1/2 of the five years from 2002–2006 of the total sum of RM39,313.26), totaling *RM59,407.65*.

Property No 6 — The sum of *RM29,415.35* as claimed is allowed and this sum comprises of the interest as at 31 December 2005 and other bank fee.

Property No 7 — The interest accrued for the year 2002 is reduced to 1/2 to RM3,520.57 (P12); the sum of RM7,381.15 (P13) for the year 2005 is allowed.
The interest accrued for the year 2006 (P14) and 2007 (P15) is disallowed.
The estimated interest of RM7,000 per year for 2003 and 2004 which is unchallenged is allowed.
The total sum of interest accrued allowed is thus *RM24,901.72*.

[18] The total sum from the above seven properties allowed by this court is RM228,850.19.

[19] In addition, the defendant also claimed an OD interest supported by bank statements P20 and P21. This court having considered these documents will allow the interest of RM11,997.66 as at 31 January 2006 in P21 as this is the latest figure of interest accrued although solicitors for the plaintiffs did not challenge the defendant on all these figures. On the next item of damages, the defendant claimed that she suffered a loss of RM277,000 in respect of property No 6 above which was force-sold by the bank at RM281,000 (P23) when the market price and the purchase price was RM558,000 relying on the sale and purchase agreement P22. However, there is no document or evidence from a property valuer or other sources apart from the defendant's own assertion that the prevailing market price was RM558,000. The defendant must prove with cogent evidence and not bare assertion. This court will hold that there is insufficient proof of the damages of RM277,000 as property value may appreciate or depreciate on account of various factors and circumstances. There is no assurance that a property would still be disposed of at its original purchase price in 2005 when the property was bought in 1996 (P22).

[20] For property No 7, the defendant also claimed the sum of RM57,000 being the difference of the purchase price at the initial purchase at RM300,000 in 1995 (P33) and the selling price of RM243,000 in 2007 (P34). As there is also no evidence of the prevailing market value from a property valuer or other sources that this said property would still be able to be sold at RM300,000 in 2007, this claim will not be allowed for same reason as in property No 6 above.

[21] Lastly, for the damages in respect of the assessment paid to the MPSP (Majlis Perbandaran Seberang Perai) for property No 6 above as at the year 2003 amounting to *RM23,260.73* (P24–P32), this court will allow this sum as, if not for the caveat, this property could have been sold and the assessment would not have been incurred.

[22] Since there is a duty to mitigate damages (see *Kabatasan Timber Extraction Co v Chong Fah Shing* [1969] 2 MLJ 6 (FC)), this court will so consider this issue. The plaintiffs contended that even with the caveat having been lodged, the defendant could still arrange for the potential purchaser to purchase the properties at the auction. If the defendant were to do so, she would be held to infringe the caveat and would render the caveat no meaning and no purpose. Secondly, it would be difficult if not impossible to find such a willing potential purchaser who would probably buy at a cheaper price in the public auction than to have an arrangement with the defendant to buy at a higher price. The plaintiffs alleged that they gave limited grant of probate to the properties if the defendant wanted to dispose of the properties. However, they wanted a full settlement and not a partial settlement as suggested by the

defendant's previous solicitors. This gives rise to a doubt as to the sincerity of the plaintiffs whether they would allow the defendant to sell any property of the estate to mitigate the loss. A

[23] One of the properties that the defendant was able to sell fetched the selling price of RM2.2m. The plaintiffs contended that the defendant had made a substantial profit and should claim no more. The defendant denied explaining that the alleged profits were all utilised to cover the bank interest. This court finds that the estate is certainly entitled to sell whatever properties for a profit and all the most for substantial profit. The plaintiffs must prove as they had asserted whether the sale at a substantial profit was as a result of their caveat and not for other reasons such as the favourable prevailing market, the good location of the property, the purchaser's craving for the property etc. There is nothing before the court that the lodgment of the caveat was the cause of the substantial profit. For the above reasons, this court finds this contention by the plaintiffs to be without merit. B C D

[24] On the plaintiffs witness statements relating basically to the question of will, the death of the deceased which they alleged could be attributed to the defendant, inter alia, which this court directed the parties to raise in submission, these matters raised in the first plaintiff's witness statement are no longer relevant with the withdrawal of the plaintiffs' claim which resulted in the collapse of the substratum of the whole defence to the counterclaim. As stated earlier, it is a desperate attempt to resurrect the plaintiffs' claim which should not be entertained in the circumstances of this case; otherwise, it would be condoning an abuse of the process of the court. E F

[25] Having heard both parties and submission by respective learned counsel, this court hereby orders that the plaintiffs shall pay the defendant damages in the total sum of *RM252,110.92* together with interest at the rate of 8% from the date of the filing of this writ to the date of realisation. G

[26] Pertaining to the question of costs on the present proceeding, it is clear that the power of the court to award costs is discretionary: O 59 r 2(2) of the Rules of the High Court 1980. The plaintiffs contended that even though there is an order of court dated 13 June 2005 that costs upon the withdrawal of the plaintiffs' claim in this writ be taxed, this court can still order no cost citing the Ireland High Court cases of *Young v Cadell & Ors* [2006] 1 EHC 49 and *Elliot & Anor v Stamp & Anor* [2006] 1 EHC 336 where the High Court there made no order as to costs. In the case of *Young v Cadell & Ors* upon the facts therein, the learned judge had made the following observations on the case: H I

(a) That as the personal representative of the testator was prepared to assent to the specific devise to the plaintiff of the dwelling house together with 0.5 hectares,

A the plaintiff had no other standing in relation to the estate of the testator and no basis for maintaining the action further.

(b) That the estates of Samuel Young and Josephine Young were not before the court and no order could be made in relation thereto.

B (c) That the plaintiff was not entitled to any relief except the assent preferred.

[27] The learned judge then went on to consider the Ireland Supreme Court decision in *Vella v Morelli* [1968] IR 11 and said:

C As Budd J made clear at the-end of his judgment, when answering the two questions posed on the facts of the case before him, the principles applies when the court is 'considering whether an unsuccessful party in a probate suit should be allowed costs out of the estate'.

D **[28]** The case of *Elliot & Anor v Stamp & Anor* quoted part of Budd J's principles in *Vella v Morelli* that wills should be open to scrutiny and to be found free of suspicion. However, *Elliot*'s case did not relate to the principles of costs out of the estate.

E **[29]** This court never doubts that 'the circumstances surrounding the execution of testamentary documents should be open to scrutiny and be above suspicion' in a suit of probate. However in the instant case that question is no longer relevant with the withdrawal of the plaintiffs' case. In other words, the plaintiffs had abandoned their claims in relation to the allegation of any F suspicion over the will of the deceased. To revive their allegation is virtually to reopen their claims for which they have withdrawn. That cannot be allowed to prejudice the defendant's claim for damages. Coming back to the case of *Young v Cadell & Ors*, the facts of the case are entirely distinguishable and the principles in the case of *Vella v Morelli* are principally pursuant to the costs out G of the estate. In the instant case before this court, the costs are from the plaintiffs and not out of the estate. Further in *Young v Cadell*'s case, the first defendant therein had filed his assent to the registration of the plaintiff as full owner of the lands specifically devised to him in the will and the learned judge remarked that the execution of that assent rendered the proceeding redundant. H Hence no order was made for costs to be paid out of the estate in line with the rationale of the practice set out by Budd J in *Vella v Morelli*. As a whole, this court finds that the authorities cited are clearly distinguishable and thus, they are not persuasive for this court not to consider costs that had been so ordered. The plaintiffs ought to know that when they lodged the caveat without valid I basis or on mere suspicious unsubstantiated by valid or cogent evidence, they might probably cause damages to the estate of the deceased and/or the defendant who was the sole executrix of the deceased's will and co-owner of some of the properties in the estate. On the same token, they ought to know that if they failed in their claims, they could end up paying costs as well. I find

no reasons in the circumstances not to allow costs to the defendant and so order that costs of this proceeding to the defendant to be taxed accordingly.

CONCLUSION

[30] For the reasons advanced above, to reiterate, this court orders that the plaintiffs shall pay the defendant damages in the total sum of RM252,110.92 together with interest at the rate of 8%pa from the date of filing of this writ to the date of realisation and costs to be taxed before the deputy registrar.

Defendant's counterclaim allowed with costs.

Reported by Mashrifah Ravendran